APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY

CATLETTSBURG

CIVIL ACTION NO. 1074

FILED DEC. 19, 1973

CURTIS CAUDILL ..... PETITIONER

VS: MEMORANDUM OPINION AND ORDER

HENRY E. COWAN, WARDEN
Kentucky State Penitentiary
Eddyville, Kentucky, ... Respondent

The petitioner, who is presently incarcerated in the Kentucky State Penitentiary at Eddyville, Kentucky, seeks Federal Habeas Corpus relief pursuant to 28 U.S.C. §2254. This Court, after finding the petitioner had exhausted his available state remedies, granted an evidentiary hearing, which was conducted at Catlettsburg, Kentucky on October 12, 1973.

The petitioner, who was represented by Court appointed counsel, presented four (4) substantive claims in support of his petition for post-conviction relief from the sentence of life imprisonment imposed by the Rowan Circuit Court, Rowan County, Kentucky on March 24, 1964 following a verdict of guilty to an indictment charging

the petitioner with the capital offense of rape of a female child under the age of twelve (12).

The petitioner's first two (2) contentions are that there was insufficient evidence to support his conviction and that the trial judge erroneously instructed the jury upon whose verdict the petitioner's conviction rests. These contentions are not cognizable in an action for federal post-conviction relief and are, therefore, rejected. *Workman v. Cardwell*, 471 F.2d 909, 911 (6th Cir. 1973); *Ballard v. Howard*, 403 F.2d 653, 654 (6th Cir. 1968), as the instant proceedings are not a substitute for appeal. *DiPazza v. United States*, 471 F.2d 719, (6th Cir. 1973).

The petitioner's third contention is that he was denied the effective assistance of counsel at his trial. It is the respondent's position that the petitioner waived his right to counsel. The record of the State Court proceedings substantiates the respondent's argument The record discloses three (3) separate attempts by the State Court to appoint counsel to represent he petitioner: March 12, 1964, March 18, 1964 and March 20, 1964. The petitioner's decision, albeit unwise, to reject those offers does not give rise to a violation of the safeguards afforded by the Sixth Amendment. See *Kelly v. Wingo*, 472 F.2d 717, 719 (6th Cir. 1973) and *United States v. Murphy*, 413 F.2d 1129, 1141 (6th Cir. 1969), cert. denied, 396 U.S. 896 (1969).

The petitioner's fourth and last contention is that he was not informed of his right to appeal, denied his right of appeal and his right to proceed on such appeal *in forma pauperis*.

The petitioner did file a motion for new trial on

March 28, 1964 which was denied the same date. Under the Kentucky Rules of Criminal Procedure, such a motion, pursuant to Rule 10.02, is one of the initial procedural avenues available to a defendant in obtaining review of his sentence. The record of the proceedings is silent, however, as to the Trial Court informing the petitioner of his right to appellate review and as to whether the petitioner ever attempted to exercise hat right. The record is not mute as to the petitioner's muliple efforts to obtain collateral review based upon the denial of his right to appeal.

At the aforementioned evidentiary hearing, the petitioner reiterates his allegations as to the Court's failure to appraise him of his various appellate rights. He further testified that he became aware of those rights only after incarceration.

Although the petitioner has the burden of establishing a violation of his constitutional rights, *Stidham* v. *Wingo*, 482 F.2d 817, 820 (6th Cir. 1973), he need only prove that he was not informed of his right of direct appeal or his right to appointed counsel on such appeal to satisfy that burden. *Lovelace* v. *Haskins*, 474 F.2d 1254, 1255-1256 (6th Cir. 1973). The lapse of almost ten (10) years since imposition of sentence does not bar the institution of this action, *Herman* v. *Claudy* 351 F.2d 116 (1956), or serve to increase his burden, *Pasley* v. *Overholser*, 282 F.2d 494, 495 (D.C. Cir. 1960); *Frost* v. *Montana*, 149 F. Supp. 349, 352-353 (D.Mont. 1966) in this instance.

The petitioner's own uncontroverted testimony has established a violation of his constitutional rights. The record does not refute but, rather, tends to substantiate

the petitioner's allegations and tesimony. Any inference of regularity that may be drawn from the petitioner's aforementioned motion for a new trial is negated by the silent record and the absence of any other corroborating evidence.

Accordingly, the petitioner's motion for a Writ of Habeas Corpus shall be, and the same hereby is, SUSTAINED on condition. A Writ shall issue, but shall be stayed for a period of ninety (90) days from the date of this Opinion and Order to permit the Kentucky Courts to consider whether the plaintiff shall be granted the right of a belated appeal with either appointed, if warrented by his financial condition or retained counsel. If no such appeal is granted, the Writ of Habeas Corpus shall become absolute upon the expiration of the stay period and the petitioner shall be released from confinement attributable to Rowan Circuit Court Indictment No. 2011 and the conviction thereon. The respondent shall timely advise the Court of any State Court order material to this action.

This cause shall remain on the docket for such further orders as may be appropriate for a period of ninety-five (95) days at which time it shall be stricken from the docket without a further Order of Court.

IT IS SO ORDERED this 19th day of December, 1973.

/s/H. David Hermansdorfer, Judge

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court

/s/Marie B. Ross, D.C.

APPENDIX B

FILED JULY 9, 1974

NO. 74-1246

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CURTIS CAUDILL,

Plaintiff-Appellee,

V.

HENRY COWAN, WARDEN,

Defendant-Appellant.

ORDER

Before: CELEBREZZE, LIVELY & ENGEL, Circuit Judges.

Upon consideration of the record, the briefs, and the oral argument of the parties, the Court finds no error in the District Court's judgment. Accordingly, the grant of the writ of habeas corpus should be, and it hereby is, Affirmed.

Entered by Order of the Court
/s/John P. Hehman
Clerk

APPENDIX C

RENDERED: MAY 26, 1972

COURT OF APPEALS OF KENTUCKY

CURTIS CAUDILL .....APPELLANT
V. APPEAL FROM ROWAN CIRCUIT COURT

HONORABLE JOHN WINN, JUDGE
COMMONWEALTH OF KENTUCKY.....APPELLEE

PER CURIAM OPINION

AFFIRMING

(Not to be officially reported or cited as authority)

This is the appellant's third RCr 11.42 motion. See Caudill 1. Commonwealth, Ky., 408 S.W. 2d 182 (1966).

Under RCr 11.42(3) the final disposition of the petitioner's first RCr 11.42 motion concluded all issues that could reasonably have been presented in the same proceeding. Gregory V. Knuckles, Ky., 471 S.W. 2d 306 (1971). The issues now asserted could have been included in the first RCr 11.42 proceeding.

The order denying relief is affirmed.

APPELLANT:

Curtis Caudill
P. O. Box 128
Eddyville, Kentucky 42038

ATTORNEYS FOR APPELLEE:

Hon. John B. Breckinridge. Attorney General
Guy C. Shearer, Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 74-1246

CURTIS CAUDILL .....PETITIONER-APPELLEE

VS. MOTION FOR STAY OF MANDATE

HENRY E. COWAN,
Warden .....RESPONDENT-APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY AT CATLETTSBURG

Respondent-Appellant, by counsel, respectfully presents this application for, and moves the Court to enter, an order staying the issuance of the mandate in this case, pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, until final disposition of the case; because it is the intention of respondent-appellant to make proper and timely application to the Supreme Court of the United States for writ of certiorari to review the decision of the Sixth Circuit in the above-styled action.

The judgment in this case was entered on July 9, 1974; the twenty-five day period for issue of mandate will expire in vacation, namely, on the 3rd day of August 1974; and the filing of a petition for a rehearing will not, therefore, stay the issue of such mandate.

It is submitted that this action by Respondent-Ap-

pellant is presented in good faith and not for delay; sets forth good and sufficient grounds for appeal, and warrants stay of issue of mandate pending disposition thereof.

ED W. HANCOCK
ATTORNEY GENERAL
By: Guy C. Shearer

Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT-APPELLANT

PROOF OF SERVICE

I, Guy C. Shearer, one of counsel for respondent-appellant, hereby certify that a copy of the foregoing Motion for Stay of Mandate was served on Petitioner-Appellee by mailing same, postage prepaid, on July 25, 1974, to Mr. Curtis Caudill, Box 128, Eddyville, Kentucky 42038, and Honorable J. Vincent Aprile II, Assistant Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601.

/s/Guy C. Shearer
Assistant Attorney General

APPENDIX E

Goza v. Mayden, 93 S.Ct. 2926, 413 U.S. 665, 37 L.Ed.2d 873 (1973)

Adams v. Illinois, 92 S.Ct. 916, 408 U.S. 278, 31 L.Ed.2d 202 (1972)

Linkletter v Walker, 85 S.Ct. 1731, 381 U.S. 618, 14 L.Ed.2d 601 (1965)

Halliday v. United States, 89 S.Ct. 1498, 394 U.S. 831, 23 L.Ed. 16, rehearing denied 89 S.Ct. 2106, 395 U.S. 971, 23 L.Ed.2d 761 (1969)

Michigan v. Payne, 93 S.Ct. 1966, 412 U.S. 47, 36 L.Ed.2d 736 (1973)

Johnson v. State of New Jersey, 86 S.Ct. 1772, 384 U.S. 719, 16 L.Ed.2d 882, rehearing denied 87 S.Ct. 12, 385 U.S. 890, 17 L.Ed.2d 121 (1966)

Warner v Flemings, 93 S.Ct. 2926

Desist v. United States, 89 S.Ct. 1030, 394 U.S. 244, 22 L.Ed.2d 248, rehearing denied 89 S.Ct. 1766, 395 U.S. 931, 23 L.Ed.2d 251 (1969)

Stovall v. Denno, 87 S.Ct. 1967, 388 U.S. 293, 18 L.Ed.2d 1199 (1967)

Tehan v. United States ex rel Shott, 86 S.Ct. 459, 382 U.S. 406, 15 L.Ed.2d 453, rehearing denied 86 S.Ct. 925, 383 U.S. 931, 15 L.Ed.2d 850 (1966)